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Supreme Court of the United States

OCTOBER TERM, 1955.

No. 653

C. F. CLICK,

Petitioner,

versus

JACKSONVILLE TERMINAL COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No.

C. F. CLICK,

Petitioner,

versus

JACKSONVILLE TERMINAL COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, C. F. Click, prays a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida in the case of *C. F. Click, Appellant, v. Jacksonville Terminal Company, a corporation, Appellee,* Case No. 26,485, lately pending in said Court.

I. REFERENCE TO OPINIONS.

Reference is made to the final judgment of the Circuit Court of Duval County, Florida, in the case of *C. F. Click, Plaintiff v. Jacksonville Terminal Company, a corporation, defendant,* Case No. 22266-L, not officially reported; a copy of said judgment (Summary Judgment) and opinion appears in the record at pages 58-59, Volume I, and is set forth in the appendix of this Petition, page 23.

Reference is further made to official opinion delivered in the Supreme Court of Florida affirming the judgment of the Circuit Court of Duval County, Florida, in the case of *C. F. Click, Appellant v. Jacksonville Terminal Company, a corporation, Appellee,* the number appearing above. The cause has not been officially reported; a copy of the judgment and opinion appears in the certified record at page 267 (Vol. III) and is set forth in the appendix of this Petition, page 24.

Further reference is made to the order of the Supreme Court of Florida denying petition for rehearing, (Record pp. 270-271, Vol. III), not officially reported, but copy is set forth in the appendix of this Petition, page 25. This was the final judgment.

II. CONCISE STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED.

Jurisdiction of this Honorable Court is invoked by authority of Title 28, Paragraph 1257 (3) United States Code, which provides:

> ". . .that final judgments rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court . . . by Writ of Certiorari, where the validity of a . . . statute of the United States is drawn in question. . . ."

The date of the judgment of the Supreme Court of Florida sought to be reviewed here, and the time of its entry was September 16th, 1955.

The date of the order denying a rehearing by the Supreme Court of Florida and its entry was November 14th, 1955. The statutory provision confering on this Honorable Court jurisdiction to review the judgment or decree in question by Writ of Certiorari is known as the Federal Employers' Liability Act (45 U.S.C.A., Sec. 5159) as set forth in the appendix of this Petition, page 26.

III. THE CERTIFIED RECORD.

For convenience of the Court, the certified record from the Supreme Court of Florida is in three volumes.

Volume I.

Volume I (pages 1-66) contains the Complaint, (record p. 1); the Answer, (record pp. 2-3); Stipulation, (record p. 3); Motion for Summary Judgment, (record p. 3); the deposition of Dr. Jack H. Bowen, record pp. 6-29); the deposition of Ernest Batten Harris, (record pp. 31-46); affidavits as follows: George F. Hobbs, (record pp. 47-48); C. H. Toler, (record pp. 48-49); Clarence Suggs, (record pp. 49-50); C. F. Click, (record pp. 51-54); C. C. Johnson, (record pp. 54-55); J. H. Bailey, (record pp. 55-56); Marttie C. Simmons, (record p. 56); and William A. Ferris, (record p. 57); Summary Judgment, (record pp. 58-59); Notice of Appeal, (record p. 60); Assignments of Error, (record p. 61); Directions to Clerk for Making Up Transcript of Record on Appeal, (record p. 62); Certificate of the Clerk, (record p. 65).

Volume II.

Volume II, (record pp. 67-262), which was known as the Supplemental Record, contains the record of the former trial, and was simply used by the lower court by stipulation (record p. 3, Vol. I) as evidence, along with the affidavits and depositions in Volume I, on the hearing of defendant's Motion for Summary Judgment in that former case. The Circuit Court of Duval County, Florida, announced its intention to direct a verdict, and the plaintiff was forced to take an involuntary non-suit, (record p. 192). This former case was appealed to the Supreme Court of Florida, but dismissed by that court for failure of Petitioner to pay the court costs of the respondent, a technicality. The costs were paid by the Petitioner, but

the appellate court nonetheless dismissed the cause and Petitioner was never heard in the appellate court in that case.

It was from the order granting defendant's Motion for Summary Judgment entered September 9th, 1954, (record pp. 58-59), that Petitioner on November 5th, 1954, appealed to the Supreme Court of Florida, (record p. 60).

Volume III.

Volume III of the certified record contains the judgment of the Supreme Court of Florida, (record p. 267); the Petition for a rehearing, (record p. 268); the order denying the Petiton for rehearing, (record p. 270); and other appellate documents not pertinent here.

IV. QUESTIONS PRESENTED.

The question presented is whether the Supreme Court of Florida has decided a Federal question of substance not heretofore determined by this Honorable Court, and decided it in a way probably not in accord with the applicable decisions of this Honorable Court in this, to-wit:

Question No. 1: WHERE PLAINTIFF CONTRACTED AN OCCUPATIONAL DISEASE KNOWN AS DERMATITUS FROM A "WEED KILLER" CONSISTING OF CREOSOTE AND DIESEL OIL, A HIGHLY TOXIC AND POISONOUS LIQUID, WILFULLY SPRAYED BY DEFENDANT ON ITS TRACKS, YARDS, ROADBED AND

PREMISES WHERE PLAINTIFF, DEFENDANT'S EMPLOYEE, RAILROADING IN INTERSTATE COMMERCE, WAS REQUIRED TO WALK AND WORK, AND THE PLAINTIFF BECAME PHOTOSENSITIZED, BURNED, POISONED AND INFECTED THEREBY, RESULTING IN SAID DERMATITUS, AND THE PLAINTIFF BROUGHT AN ACTION AGAINST DEFENDANT UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, TO WHICH ASSUMPTION OF RISK IS NO DEFENSE, AND CONTRIBUTORY NEGLIGENCE IS ONLY A PARTIAL DEFENSE, DID THE SUPREME COURT OF FLORIDA PROPERLY APPLY THE APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT UNDER SAID ACT IN AFFIRMING AN ORDER ENTERING A SUMMARY JUDGMENT BY THE TRIAL COURT, WITHOUT SUBMITTING THE QUESTION OF PROXIMATE CAUSE TO THE JURY?

Answer: The Supreme Court of Florida answered in the affirmative.

Question No. 2: WHERE DEFENDANT, OPERATING A RAILROAD IN INTERSTATE COMMERCE, WILFULLY OR NEGLIGENTLY MANUFACTURED AND SPRAYED ITS PREMISES, TRACKS, YARD AND ROADBED WITH A "WEED KILLER" WHICH IT MANUFACTURED, CONSISTING OF CREOSOTE AND DIESEL OIL, AND WITH WHICH PLAINTIFF-EMPLOYEE CAME IN CONTACT, CAUSING PLAINTIFF TO BE BURNED AND PHOTOSENSITIZED SO THAT PLAINTIFF WOULD BECOME AFFECTED UPON SUCH USE BY THE DEFENDANT, AND AFTER NOTICE

DEFENDANT KNEW OF THE POISONOUS EFFECT OF THIS TOXIC LIQUID AND THE DEFENDANT THEREAFTER WILFULLY CONTINUED TO SPRAY THE PREMISES, TRACKS, YARD AND ROADBED WITH SUCH "WEED KILLER" AFFECTING THE PLAINTIFF TO THE EXTENT THAT HE CONTRACTED AN OCCUPATIONAL DISEASE KNOWN AS DERMATITUS, AND SUIT WAS BROUGHT UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, WHERE ASSUMPTION OF RISK IS NO DEFENSE, AND CONTRIBUTORY NEGLIGENCE IS ONLY A PARTIAL DEFENSE, DID THE SUPREME COURT OF FLORIDA CORRECTLY INTERPRET THE FEDERAL EMPLOYERS' LIABILITY ACT, WITHOUT DOING VIOLENCE TO PLAINTIFF'S FEDERAL RIGHTS THEREUNDER, WHEN SAID COURT ENTERED A "PER CURIAM" DECISION SUSTAINING A TRIAL COURT IN ENTERING A SUMMARY JUDGMENT, WITHOUT A JURY TRIAL WHERE THE QUESTION OF THE EVIDENCE, CIRCUMSTANTIAL EVIDENCE AND PROXIMATE CAUSE ARE FOR THE JURY TO DETERMINE?

Answer: The Supreme Court of Florida answered in the affirmative.

V. TEXT OF STATUTE.

The pertinent text of the statute because of its length, is here set forth in the appendix, at page 26, viz: Title 45, U.S.C.A., Secs. 51, 53 and 54.

VI. STATEMENT OF FACTS.

The plaintiff is an employee of the Jacksonville Terminal Company and has been since September 3, 1925, (record p. 21), and during the months of July and August, 1951, he was employed as a conductor for the Jacksonville Terminal Company, (record p. 51), and was assigned to the job of removing or "pulling" cars out of storage tracks to allow a machine containing a "weed killer" to go in and spray the tracks, (record p. 51).

The "weed killer" used by the defendant, Jacksonville Terminal Company, consisted of twenty-five (25%) percent creosote and seventy-five (75%) percent diesel fuel, (record p. 37). It was the Chief Engineer, Ernest Batten Harris, who determined this formula by experiment on vegetation, (record p. 37), and who determined that the spray was to be used, (record p. 38). Mr. Harris did not study chemistry, (record p. 37), but is a civil engineer. Mr. Harris never made any tests to determine whether or not the fuel oil and creosote mixture was harmful to animals or human beings, (record pp. 41-44), nor did he make any inquiry about it. Mr. Harris, being in charge of track maintenance, received no instructions about the "weed killer"; (record page 38), being the head of the department, he simply requisitioned the creosote and fuel oil and sprayed all of the area where the tracks are, (record page 39). The work of actually applying the "weed killer" was assigned to the witness, Oglesby, and a colored boy by the name of Collier, (record page 40). The tracks were sprayed an average of two or three times a year, (record page 41). Dr. Jack H. Bowen, Jacksonville

physician specializing in dermatology, first saw the plaintiff on April 18th, 1952, (record page 7), and treated him on weekly intervals through June, and then he had a lapse of treatment until August 12th, when he had a recurrence of the eruption on his knee and thighs, and again on May 16th, 1952, after an exposure in the area treated with the creosote and diesel oil, (record page 9). Again in 1953, he was treated by Dr. Bowen for the condition practically like he started off, (record page 10). He was treated by X-ray, radiation therapy, boric acid soaks and anti-histamine cream and later aveeno compress, (record pages 10-11). The doctor attributed the condition to irritation, sensitization to his exposure to creosote and diesel oil, (record page 12). During the course of time, Mr. Click became photosensitized as a result of the repeated contact with the creosote spray, so that now when he even gets in the sun he has a flare-up of the pre-existing eruption, (record pages 18 & 25). His trouble paralleled the spraying of the railroad yards, (record pages 19 & 25), and because if creosote is on the ground, he walks around on the ground and gets it on his pants, and it stays on the skin, the unexposed areas of his skin were affected, (record page 19). The condition resulted in increased pigmentation of Mr. Click's skin all over, (record page 23).

While the plaintiff was assigned to the job of pulling the cars from the tracks to allow the spray cart operated by Suggs and Collier to enter the tracks and spray the weeds, he was required, as such conductor, to be on the ground in order to supervise the operation of removing and replacing the cars on these tracks; his duties neces-

sitated being on the ground and to cross through the weeds that were freshly sprayed by the creosote "weed killer". The creosote "weed killer" was applied to the tracks known as YB and YC in the coach yard, and was applied more heavily than in any other place in the defendant's yard. That the spray cart on entering these tracks would travel at a very slow rate of speed in order to apply more weed killer to the weeds there, and would double spray by backing out of the tracks, since the weed growth was so heavy on the tracks. Plaintiff had no choice but to be on the ground and walk through the freshly sprayed areas in order to carry out his duties assigned to him. Plaintiff complained to Yard Master Smith and requested that he be given other duties and not be required to be in and about the spray, which the Yard Master knew was harmful, (record p. 52); that the Yard Master explained to the plaintiff that the reason he was having plaintiff do the job and paying him overtime for doing it was that plaintiff would do it two or three times faster than the other crew, and he wanted the job done right away so that the tracks would be ready for the trains when they came in the yard. Plaintiff says that on this occasion when he received the worst burn from the creosote "weed killer", that he had been burned on previous occasions and on many occasions when he was required to be in and about the areas where there were concentrations of the creosote "weed killer" against his will, but at the instruction of his employer. Plaintiff complained to every one of the yard masters in 1951, (record p. 120, Vol. II), and showed them what had happened to him; pulled his breeches down and showed where it was on the back of his legs and there was blood on them, and

told the yard master he was going to have to give up—he couldn't make it. (record p. 119, Vol. II). Plaintiff was injured from the spray in 1953. The spray was applied two or three times a year since 1950, (record p. 41).

VII. METHOD OF RAISING FEDERAL QUESTION.

The Federal question sought to be reviewed *was raised by the Complaint,* or pleading (record p. 1, Vol. I) as follows:

> ". . .That at all times hereinafter mentioned the defendant was the owner of a railroad engaged in the managing and handling of trains and cars transported in interstate commerce and was possessed of a yard and tracks, including engines and cars and other equipment for the purpose of transporting same in interstate commerce. This Court has jurisdiction herein, arising under the Federal Employers' Liability Act as Amended in 1939. . ."

Also the question of the Federal Employers' Liability Act was raised and admitted by counsel for the defendant in the evidence, (record p. 16, Vol. II) as follows:

> ". . .Q. Now, is the Terminal Company here in Jacksonville a company which handles cars in interstate commerce?
> A. Yes, sir.
> Q. That's passenger and freight, or both or—
> A. Just passengers—There is a question about whether the Jacksonville Terminal actually handles in interstate commerce. I would like to retract that. We handle cars coming in over other railroads.

Q. They take them and get them ready to send them out they are sent from the Terminal Company across state lines?

A. Turn them over to the connecting lines.

Q. I understand that there is no dispute about that, Mr. Bailey. I am not trying to mix you up. There is no question of the law for the Terminal Company. You are in interstate commerce?

A. Yes, sir.

MR. ADAMS: The defendant admits the Jacksonville Terminal Company is engaged in interstate commerce. We object to the question as calling for a legal conclusion.

THE COURT: Well, you have admitted what he wanted, so let's proceed. . ."

And in Volume II of the record, at page 22:

". . .Is the Company engaged in interstate commerce, that is, transporting trains to other lines that take them to other states?

A. Yes, sir.

MR. ADAMS: May the Court please, we have admitted that the company is engaged in interstate commerce.

THE COURT: I think that is sufficient, too.

MR. MURRELL: I won't pursue it any further. I just wanted to make sure the Federal Employers' Liability Act *implies.* (CT. Rep. ERROR; should read "APP"

THE COURT: Well, they have admitted it, so let's go ahead. . ."

Also the Federal question was raised by the following Assignments of Error (record p. 61):

> "1. The Court erred in granting defendant's motion for summary judgment.
>
> 2. The Court erred in entering the summary judgment herein.
>
> 3. The Court erred in refusing to submit the case to a jury. . .
>
> 6. The Court erred in finding that there was no genuine issue as to any material fact, and that the defendant was entitled to judgment as a matter of law. . ."

thereby fully raising a Federal question before both lower courts.

VIII. ARGUMENT.

The essential elements of the case therefore, were whether or not there were any probative facts from which wilfulness or negligence of the railroad and the causal relation could reasonably be inferred.

In cases involving the Federal Employers' Liability Act, the negligence of the employer is based on negligence (or wilfullness) where an injury is sustained by an employee and, incidentally, the failure to furnish a safe place to work, the 1939 amendment barring assumption of risk as a defense and contributory negligence as a total defense, has been said by the Supreme Court of the United States

as having stricken every vestige of the right of these defenses under the act.

Did the defendant here do a wilfull or negligent act which imposed liability on the defendant under the act? For if it did, as we contend it did, there were present probative facts from which the wilfullness or negligence and the causal relation could reasonably be inferred. It was certainly a question of fact for the jury to determine, and the entering of the summary judgment did violence to the plaintiff's rights under the act.

Occupational disease in recent years has been established more firmly as a result of negligence or wilfullness, and there are some cases holding recovery proper under the Federal Employers' Liability Act. See *Urie v. Thompson*, 69 S.C. 1018, 93 L. Ed. 1282, and *James v. Pennsylvania*, 196 F. 2d 1021, 101 F. Sup. 241. Also see *Kansas City Sou. Ry. v. Chandler*, Texas Civil Court of Appeals, 192 S.W. 2d 304.

In the case of *Tennant v. Peoria & P. U. Ry. Co.*, Ill. 1944, 64 S. Ct. 409, 321 U.S. 29, 88 L. Ed. 520, and the case of *Hiller v. Atlantic Coast Line Ry. Co.*, 63 S. Ct. 444, 318 U.S. 54, 87 L. Ed. 610, the Supreme Court of the United States said:

> ". . .In view of the 1939 amendment to section 54 of this chapter abolishing assumption of risk doctrine, no case is to be withdrawn from a jury on any theory of assumption of risk, and questions of negligence should under proper charge from court be submitted to jury for their determination."

The duty which is imposed on an employer under the Federal Employers' Liability Act is (1) absolute, (2) nondelegable, and (3) extends to each and every employee. This duty has been decided by our state court and approved by the Supreme Court of the United States so frequently that we need only refer to the following cases, viz: *Tennant v. Peoria & P. U. Ry. Co., supra; Tiller v. Atlantic Coast Line Ry. Co., supra; Bly v. Sou. Ry. Co.,* 31 S.E. 2d 564, 183 Va. 162, 172 A. L. R. 584; *Blair v. Baltimore & Ohio Ry. Co.,* 65 S. Ct. 545, 89 L. Ed. 490; and *Wolf v. Henwood,* 162 F. 2d 998, certiorari denied, 68 S. Ct. 88, 92 L. Ed. 357.

Since there can be no question but that the duty was owed by the defendant here to the plaintiff the problem devolves into two parts: (1) Whether or not the defendant fulfilled its duty and obligation to the plaintiff, and (2) If the duty were breached, was this a proximate or contributing cause of the plaintiff's injury or disease.

The question of whether or not there was a want of due care in all the circumstances, in whole or in part, under the Federal Employers' Liability Act, was a question of fact for the jury to determine. See *Tennant v. Peoria & P. U. Ry., supra,* and *Tiller v. Atlantic Coast Line Ry. Co., supra.* In the light of the foregoing, let us consider the facts in this case.

Mr. Click was an employee of the defendant. The defendant knew Mr. Click was required to work in and around the spray car and the tracks which had been sprayed by the "weed killer". They directed him to work

there. The defendant knew plaintiff's occupation required him to be around the "weed killer" and that it was injurious to him because he had complained to them about it; only to be directed to return to the vicinity where the "weed killer" was sprayed, and defendant persisted in reapplying the "weed killer" to the area where plaintiff was required to work. The defendant exercised *no care* at all with reference to the plaintiff; in fact, it wilfully disregarded his complaints and requests that he be relieved from duty where defendant knew it had created the toxic condition. While it is impossible to determine any particular standard for measuring due care of a defendant under such circumstances, we think the conduct of the defendant manifestly shows the breach of that duty imposed on it by the Federal Employers' Liability Act, and that no care whatever was exercised with respect to the plaintiff.

The negligence of the defendant might consist of one or more of the following: (1) Failure to determine whether or not the mixture of creosote and diesel oil was harmful to the plaintiff; (2) The defendant's wilfull or negligent disregard of the plaintiff's repeated complaints requesting that he be relieved from duty in the sprayed area; (3) The failure of the defendant to see that the plaintiff be not endangered by the toxic or poisonous liquids applied by it to its premises; (4) The repeated application by the defendant of the "weed killer" after the plaintiff had requested that the condition be removed or alleviated; (5) In ordering plaintiff to return to work in the sprayed area by defendant's foreman.

Under the Federal Employers' Liability Act, the rights which the act create are Federal rights protected by Federal law, rather than by local law. (319 U.S. 52.)

It is appropriate to consider the function of the jury in these Federal Employers' Liability Act cases as defined by the Federal Court in *Bailey v. Central Vermont*, 63 S. Ct. 1062, 87 L. Ed. 1444, where the Court said:

> ". . .The right to trial by jury is a 'basic and fundamental feature of our system of Federal jurisprudence' Jacob v. New York City, 315 U.S. 742. It is part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. . . To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

> "The words 'in part' have enlarged the field or scope of proximate causes—in these railroad injury cases. These words suggest that there may be a plurality of causes, each of which is sufficient to permit a jury to assess a liability."

Eglsaer v. Scandrett, (CCA 7) 151 F. 2d 562.

> "The fact that a jury's verdict involves speculation and conjecture does not make it objectionable, so long as it has basis in the evidence, the jury being free to discard or disbelieve whatever facts are inconsistent with its conclusion."

Lavender v. Kurn, 90 L. Ed. 917, 327 U.S. 645.

The Supreme Court of Florida once said:

> ". . .The act of Congress giving this right of action not existing at common law is paramount substantive law creating a new right and limiting in express terms its use and purposes. Such legislation cannot therefore be regarded as a mere regulation of judicial procedure. . ."
>
> *Flanders v. Georgia S & F Ry. Co., 68 Fla. 479, 67 So. 2d 68.*

This Honorable Court, in *Griswold v. Gardner,* 155 F.2d 33, held that a safe place to work could be made unsafe by the operation of a train.

A long series of cases in which this Honorable Court has reversed the lower courts under the Federal Employers' Liability Act, are: *Tiller v. Atlantic Coast Line Ry. Co., supra; Owen v. Pacific Ry. Co.,* 319 U.S. 715, 63 S. Ct. 1271; *Tennant v. Peoria etc. Ry. Co., supra; Lavender v. Kurn,* 90 L. Ed. 917, 327 U.S. 645; *Ellis v. Union Pacific Ry. Co.,* 91 L. Ed. 572; *Mires v. Redding,* 91 L. Ed. 1129; *Jesianowski v. Boston & Maine,* 429 U.S. 452; *Bailey v. Central Vermont Ry. Co.,* 319 U.S. 350, 63 S.Ct. 1062; 87 L. Ed. 1444; and *Blair v. O. R. Baltimore Ry. Co.,* 65 S. Ct. 545, 89 L. Ed. 490. The lower court rulings in the above cases were held to be erroneous and this Court said:

> ". . .We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'. . ."

The case of *Lavender v. Kurn, supra,* one of the latest cases of this Honorable Court under the Federal Employers' Liability Act, leaves little room for doubt but that a directed verdict by a trial court or a holding of any court sustaining a directed verdict will not receive favor, although the verdict involves speculation and conjecture. In the *Tiller* case, *supra,* Justice Black said:

> ". . .It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, releasing the employees from the burden of assumption of risk by whatever name it was called. The result is an Act which requires cases tried under the Federal Act to be handled as though no doctrine of assumption of risk had ever existed. . ."

It was the continuing duty of the employer to furnish plaintiff with a safe place to work, regardless of infrequency of use of such place and such duty increased with the risk, as in *Bimberg v. Northern Pac. Ry. Co.,* 14 N. W. 2d 410, 217 Minn. 187.

A careful study of the *Tiller & Atlantic Coast Line, supra,* and cases subsequently decided by this Honorable Court, establishes that matters of negligence and of proximate cause are for the jury, which may be set aside only when there is a complete absence of probative facts to support a conclusion reached. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences and a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by reaching what seems to be the most reasonable inferences, the matter was held to be

for the jury and not to be disturbed by an appellate court, which might draw a contrary inference or feel another conclusion might be more reasonable. *Ellis v. Union Pacific Ry. Co., supra,* and *Lavender v. Kurn, supra.* The "reason why" assumption of risk is obliterated is because the matter has the right to expect complete obedience from the servant.

> ". . .The servant does not stand on the same footing with the master. *His primary duty is obedience;* and if when in the discharge of that duty he is damaged through the neglect of the master, it is proper that he should be recompensed. . ."
>
> *Vandalie R. Co. v. Kendall, 1918, 119 N.E. 68 Ind. App. 1.*

It can be seen from the liberal language of the Act and the decisions which require its liberal interpretation, that this provision of the Federal Employers' Liability Act is not simply confined to accidental injuries. Under the Federal Employers' Liability Act, we are not without authority to show that occupational disease may be caused through the negligence of the employer; in fact, in this case, we have direct evidence of knowledge by the employer that the spraying would affect the defendant, which is not inconsistent with the following cases: *Urie v. Thompson,* 69 S.C. 1018, 93 L. Ed. 1282; *Carpenter v. A. T. & S. F. Ry. Co.,* 109 C.A. 218, 240 P. 25; *Allbright v. Pennsylvania,* 37 A. 2870, certiorari denied 65, S.C. 72, 89 L. Ed. 589.

There is no doubt but that this would cover a pre-existing condition which was aggravated. In the case of

Crozier v. Charleston W. C. Ry. Co., 71 S.E. 2, 800, an aggravation of a pre-existing arm injury was the basis of the recovery.

Repeated injuries have been the basis of recovery under the act. See *K. C. So. Ry. Co. v. Chandler*, 192 S.W. 2d 302, where a switchman recovered for injuries resulting from repeated traumas caused by repeated jumps on a pathway which had been negligently covered with rocks.

The term "injury" as defined by the Court is not confined to those inflicted by external, violent or accidental means. See *Urie v. Thompson, supra; James v. Pennsylvania*, 196 F. 2d 1021, 101 F. Sup. 241. It is interesting to note the decision in the case of *Lillie v. Thompson*, 173 F. 2d 481, 92 L. Ed. 73, where the court allowed a recovery on behalf of a female telegraph operator who was placed at a point where the court held a person of reasonable prudence should have known was one of particular hazard for a female employee, and that thereafter, a negro not employed by the railroad criminally attacked her.

A California case, *McGuigan v. So. Pacific*, 247 P. 2d 415, allowed recovery for the death of a yard man, who had been given three months sick leave because of a heart condition, but before the end of his leave, was returned to work as a herder after railroad superintendent misrepresented the duties involved to the doctor who terminated his leave.

These decisions were all decided under the question of a safe place to work. As can be seen from the fore-

going citations, a safe place to work is not just safe for a bare majority or for ninety-nine percent, but the duty is owed to each and every employee.

IX. PRAYER.

By the trial court's entry of the summary judgment and the affirmance of the trial court by "per curiam" decision delivered in the Supreme Court of Florida which denied the plaintiff a jury trial, demonstrates that this case was not decided in accordance with the applicable decisions of this Honorable Court, and that Petitioner's rights under the Federal Employers' Liability Act, *supra,* have been lessened and diminished and reduced to destruction, and the substantive rights to trial by jury have been violated, lessened and diminished contrary to the holdings of this Honorable Court.

WHEREFORE, Petitioner prays that this petition be granted and this Honorable Court do issue to the Supreme Court of Florida its Writ of Certiorari directing and commanding said Court to hand up its record for review by this Honorable Court, and for further relief in the premises as may be proper and just.

This 25th day of January, A. D., 1956.

WILL O. MURRELL,
Attorney for Petitioner,
100 Law Exchange Building
Jacksonville, Florida.

APPENDIX.

FINAL JUDGMENT OF THE CIRCUIT COURT OF DUVAL COUNTY, FLORIDA, CASE No. 22266-L.

Recorded in Minute Book 115, p. 99.

Summary Judgment.

This cause came on to be heard on motion of the defendant, Jacksonville Terminal Company, a corporation, for summary judgment, together with affidavits and depositions as filed by the plaintiff, C. F. Click, in opposition to said motion for summary judgment, and the stipulation between plaintiff and defendant that the transcript of the record as exists in the case of *C. F. Click vs. Jacksonville Terminal Company, a corporation,* Circuit Court, Duval County, Florida, No. 21458-L, permitting use by either party of said transcript in all respects in the prosecution of this cause herein, and the Court having carefully examined and considered the said transcript of record, affidavits and depositions as duly filed herein, it appears to the Court and the Court so finds (a) that the issues of fact and law as presented in the prior suit between the parties hereto, being the case of *C. F. Click vs. Jacksonville Terminal Company, a corporation,* No. 21458-L, are identical with the issues of fact and law as exists in this cause herein; (b) that the depositions and affidavits as filed in this cause by the plaintiff in opposition to motion for summary judgment as filed by defendant do not contain or raise any different material issue of fact or law which was not advanced or prosecuted in the prior trial between the parties herein; (c) that from the pleadings, affidavits,

depositions and record in this cause herein, there does not exist any genuine issue as to any material fact, and the defendant is entitled to judgment herein as a matter of law. Now, therefore, upon consideration thereof, it is,

ORDERED AND ADJUDGED that motion for summary judgment as filed by the defendant, Jacksonville Terminal Company, a corporation, be, and the same is hereby granted, and that judgment be, and the same is hereby entered for the defendant, and that the defendant, Jacksonville Terminal Company, a corporation, do have and recover of and from the plaintiff, C. F. Click, the costs incurred by it in this cause herein.

DONE AND ORDERED IN Chambers at Jacksonville, Duval County, Florida, this 9th day of September, 1954.

EDWIN L. JONES,
Judge.

Opinion Delivered in the Supreme Court of Florida Affirming the Judgment of the Circuit Court of Duval County, Florida.

Opinion filed September 16, 1955.

An Appeal from the Circuit Court for Duval County, Edwin L. Jones, Judge.

Will O. Murrell, Jr., for Appellant.

McCarthy, Lane & Adams and Elliott Adams, for Appellee.

PER CURIAM.

Affirmed.

DREW, C. J., TERRELL, SEBRING and ROBERTS, J. J., CONCUR.

Order of the Supreme Court of Florida Denying Petition for Rehearing.

Counsel for Appellant having filed in this cause Petition for Rehearing and having been considered, it is ordered by the Court that said Petition be and the same is hereby denied.

A true copy,

TESTE:

GUYTE P. McCORD,
Clerk Supreme Court,

(COURT SEAL).

Federal Employers' Liability Act.

T. 45 Secs. 51 et seq., U. S. Code.

§51. LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE; DEFINITION OF EMPLOYEES.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or District of Columbia, and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth, shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, C. 149 Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685 Sec. 1, 53 Stat. 1404, Sec. 51, Title 45, U.S.C.A.

§53. CONTRIBUTORY NEGLIGENCE; DIMINUTION OF DAMAGES.

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 3, 35 Stat. 66.

Section 53, Title 45, U. S. C. A.

§54. ASSUMPTION OF RISKS OF EMPLOYMENT.

That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of

such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939 c. 685, Sec. 1, 53 Stat. 1404.

Section 54, Title 45, U.S.C.A.

FEB 2) 1956
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955

No. 653

C. F. CLICK,

Petitioner,

versus

JACKSONVILLE TERMINAL COMPANY,
a corporation,

Respondent.

BRIEF OF RESPONDENT

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

ELLIOTT ADAMS
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Supreme Court of the United States

OCTOBER TERM, 1955

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C. F. CLICK,

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JACKSONVILLE TERMINAL COMPANY,
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Respondent.

BRIEF OF RESPONDENT

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

ELLIOTT ADAMS
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I

STATEMENT OF THE PLEADING

This is a petition for writ of certiorari by C. F. Click to the order of affirmance by the Supreme Court of Florida of the summary judgment in an action against Jacksonville Terminal Company for damages resulting from dermatitis allegedly contracted from a solution of creosote and diesel fuel used by respondent, defendant below, to kill weeds in its railroad yards in the City of Jacksonville, Florida. Petitioner, plaintiff below, alleges that he contracted the dermatitis in June of 1951, and that the respondent was negligent in not furnishing the petitioner a safe place to work. Petitioner further alleges that the creosote-diesel oil mixture is toxic and poisonous.

The petitioner filed two suits, the first on June 3, 1953, which was tried on December 16 and 17, 1953, resulting in a voluntary non-suit from which the petitioner appealed. The appeal was dismissed because the petitioner had not paid the respondent's judgment for costs. The second suit was filed April 21, 1954. The complaint is identical with the complaint in the first suit. Respondent filed an identical answer, denying its negligence and the alleged results thereof.

On motion of respondent, supported by the transcript of record in the original suit, the Court entered a summary judgment for the defendant. This judgment was affirmed by the Supreme Court of Florida, and a petition for rehearing was denied.

II

STATEMENT OF THE FACTS

In 1951 petitioner, C. F. Click, who hereafter will be referred to as plaintiff, was employed as a yard conductor by the respondent, Jacksonville Terminal Company, which will hereafter be referred to as defendant. The defendant,

in order to kill the weeds and to keep them down in the yards, two or three times a year, sprayed the area between and around the tracks with a mixture of creosote and diesel fuel. In two or three instances men received direct burns (record pp. 105, 125 and 133) from contact with the creosote spray, the effect was similar to sunburn and would clear up, and when the skin healed they had no further trouble with it (record p. 133). One of these men got the spray on a raw blister. The other two operated the spray machine. There were several hundred people in and about the tracks and the area sprayed and, except for the three men mentioned, only one, the plaintff, C. F. Click, suffered any ill effects.

In June of 1951, Mr. Click contracted a painful and irritating rash. Of his experience he said: "I never complained to anybody much about it because I didn't know what was eating me. I only thought the skin was tender, and maybe it would be all right, and I heard other people have been burned with it and would get used to it, but I kept getting worse and worse," (record p. 177). He had to give up work for a while in July and, in August of 1951, he went to North Carolina.

While Mr. Click was in North Carolina he contracted pneumonia. The doctors in North Carolina treated Mr. Click with penicillin for his pneumonia, and he broke out with a rash again. He suffered from this rash and did not return to work until the first of the year, 1952 (record p. 194).

Thereafter, in April 1952, Mr. Click consulted Dr. Bowen and in May of 1952, Dr. Bowen diagnosed his ailment as of that time as photosensitization from the creosote-diesel fuel solution. Mr. Click did not discover that it was the creosote spray that was burning him until the doctor told him in May of 1952.

Mr. Murrell: Q "Did you have any ill effects from the spray?"

Mr. Click: A "I had a burning sensation I got into from time to time, along about the first of 1950, and from then on, but I didn't know what it was."

— — — — — — — — — —

Mr. Adams: Q "When did you discover that it was the creosote spray that was burning you?"

Mr. Click: A "I was pretty sure in 1950 that it was, but I wasn't positive until a doctor made an allergy test and told me." (record pp. 123-124)

In reviewing Mr. Click's history, Dr. Bowen was of the opinion that the rash or eruption from which Mr. Click suffered from August 1951 until some time after January 1, 1952, was his allergic reaction to the penicillin with which he was treated for pneumonia in North Carolina (record 15,17), and in September of 1953, at the time of the taking of Dr. Bowen's deposition, the doctor could not exclude the possibility that Mr. Click was still suffering from sensitivity from the penicillin (record p. 20).

In April of 1952 Mr. Click consulted Dr. Bowen and in May 1952, Dr. Bowen diagnosed Mr. Click's ailment as contact dermatitis from creosote (record p. 228).

Dr. Bowen, however, was unwilling to make a diagnosis of plaintiff's ailment as of June of 1951, the date alleged in the complaint.

As of June 1951, Dr. Bowen testified that plaintiff's ailment "could have been penicillin it could have been creosote. He has had two or three reactions, and it could have been any number of things" (record pp. 242,243).

Dr. Bowen explained the malady: "So-called photosensitizing agents, among which is creosote, usually the sensitization is long lasting (sic.), and they don't have to reexpose themselves to creosote. They can expose themselves to sunlight, which has photosensitized the skin, so that it will cause itching from visible dermatitis from exposure to the sun. There is no way of telling when any individual patient will lose that sensitization" (record p. 13).

Photosensitization means "you are sensitive to sunlight, you react. One who has photosensitization will react abnormally to exposure to the sun" (record p. 234).

"Creosote is a very peculiar thing. You can have a photosensitizing eruption and get sun, not even get close to creosote, but get sun on it and you can have a flare up of a pre-existing eruption, because of that photosensitizing character" (record p. 18).

Dr. Bowen stated that he rarely saw anyone with photosensitization from creosote, that it was "a peculiar type of allergic reaction, different from most of them, because most do not photosensitize," and that it was a type of allergic reaction that other people do not have (record p. 229). It is entirely different from the primary burn which an ordinary person might suffer from direct contact with a concentrated form of creosote (record p. 229).

Dr. Bowen went on to say that the normal person would not react to the fumes from the spray of creosote and diesel fuel as used by the defendant as a weed killer (record p. 230); and in the case where a person does contract photosensitization from exposure to creosote it is the peculiar, unusual reaction in the body of that person that does it (record p. 244).

"That there is no way to tell whether a person is or is

not allergic . . . until such time as the spray has been put out and they have been affected by it; . . . that that is the way it is done . . . because it is so unusual to see a photosensitized dermatitis, — very unusual . . ." (record p. 231).

In answer to a question by Mr. Murrell, Dr. Bowen further testified: "I don't think creosote, the way it is handled is any more hazard than anything else. For instance, if you are going out there putting a pipe down for your water, it is a hazard, because you can get creeping eruption. And I don't think creosote would be considered any more of a hazard than just the normal hazard of living, as far as working" (record p. 28).

Plaintiff seeks to charge defendant with knowledge that the spray had a harmful effect on him. In his affidavit (record p. 51-54) he says he requested Yardmaster Smith that he be given other duties and not be required to be in and about the spray "which the Yard Master knew was harmful" and that he was required to be in the area sprayed "against his will but at the instructions of his employer."

An affidavit in support of or opposed to a motion for summary judgment must state facts that would constitute probative evidence°. Click's statement that "the yardmaster knew the spray to be harmful," is a conclusion that is not admissible evidence. Smith was plaintiff's witness at the first trial. He said he hadn't worked in the coach yards for three years (record p. 93). He said Click did not complain to him about his work in the coach yard (record p. 91) or about the spraying (record p. 92) and there is nothing in his testimony that would indicate that he knew the spray to be harmful.

Plaintiff's affidavit further says that he complained to

°Florida Rules of Civil Procedure #1.36(e)

Yardmaster H. Wilson who is said to have replied "I just thought you were beefing." Mr. Wilson was one of the plaintiff's witnesses at the first trial. He testified: "I heard him mention he didn't like to work around where that weed killer had to be sprayed" (record p. 139). Click made that complaint several times, but there is nothing in Wilson's testimony that indicates that he had any knowledge that the spray was harmful, and in fact Mr. Wilson did not know what had caused Click's skin eruption (record p. 141).

In fact, to begin with, Click didn't complain much because he "didn't know what was eating on him" (record p. 166). Furthermore, the cause has not been definitely determined. Dr. Bowen testified as to his diagnosis of plaintiff in April and May of 1952 (record pp. 179,190), but as to his condition in June of 1951, Dr. Bowen stated that "it could have been penicillin, it could have been creosote . . . it could have been any number of things" (record pp. 242-243).

It was not until he compiled his affidavits to oppose the motion for summary judgment that plaintiff attempted to prove notice to the defendant of his condition. And, as has been pointed out, the statements contained in the affidavits are not of facts, but are conclusions that have no probative value.

III
QUESTION PRESENTED

WHERE THE COMPLAINT ALLEGES THAT THE DEFENDANT CARELESSLY AND NEGLIGENTLY FAILED TO FURNISH THE PLAINTIFF A SAFE PLACE TO WORK BY SPRAYING THE WEEDS BETWEEN TRACKS WITH A TOXIC AND POISONOUS SPRAY, MAY THE PLAINTIFF RECOVER BY PROVING ONLY THAT HE SUFFERED INJURY FROM THE SPRAY?

This question was and should be answered in the negative.

The defendant cannot admit that plaintiff has correctly stated the question presented. Plaintiff states the question presented as follows:

> "Where plaintiff contracted an occupational disease known as dermatitus from a 'weed killer' consisting of creosote and diesel oil, a highly toxic and poisonous liquid, wilfully sprayed by defendant on its tracks, yards, roadbed and premises where plaintiff, defendant's employee, railroading in interstate commerce, was required to walk and work, and the plaintiff became photosensitized, burned, poisoned and infected thereby, resulting in said dermatitus, and the plaintiff brought an action against defendant under the Federal Employers' Liability Act, to which assumption of risk is no defense, and contributory negligence is only a partial defense, did the Supreme Court of Florida properly apply the applicable decisions of the United States Supreme Court under said Act in affirming an order entering a summary judgment by the trial court, without submitting the question of proximate cause to the jury?"

The question as thus stated assumes the correctness of plaintiff's position on the very point here in controversy. The plaintiff assumes that the creosote and diesel oil spray is "a highly toxic and poisonous liquid," but that is not borne out by the record. The question presented is not whether the allegations and proof of defendant's negligence was sufficient, but whether or not there was any negligence alleged or proven. It is the duty of the carrier to use reasonable care to furnish its employees with a reasonably safe place to work, not to insure its employees from all injury.

The question presented might be fairly stated:

> "Where the complaint alleges that the defendant carelessly and negligently failed to furnish the plaintiff a safe place to work by spraying the weeds between tracks with

a toxic and poisonous spray, may the plaintiff recover by proving only that he suffered injury from the spray?"

IV
ARGUMENT

It is necessary that the plaintiff prove that the creosote and diesel oil spray was a toxic and poisonous liquid. This he totally failed to do.

Plaintiff's witness, Dr. Jack H. Bowen, said that the use of the spray was no more of a hazard than the normal hazards of living (record p. 28); that a normal person would not have a reaction to the spray (record p. 229); that in the case where a person does contract photosensitization from exposure to creosote it is the *peculiar, unusual* reaction in the body of the person that does it (record p. 244); and that it is a peculiar allergic reaction in the person that is rarely seen which causes him to suffer from photosensitization (record p. 229).

There is no showing that the spray is "highly toxic and poisonous."

Out of several hundred employees of the defendant, plaintiff alone was affected.

If the spray had been "highly toxic and poisonous" it would have adversely affected the normal man. It did not affect the normal man.

Plaintiff attempts to impute an inference of carelessness or recklessness in the conduct of the defendant by saying that the liquid was "*wilfully* sprayed by defendant." The spray was used intentionally. The spray was known to defendant's chief engineer as an effective means of killing

weeds. He had used a similar solution with the Seaboard Air Line Railroad since the year 1947, with no record of any injury (record pp. 42,44).

Plaintiff's medical witness, Dr. Jack H. Bowen, stated that the creosote spray mixture was not harmful to the normal person, and that the only way it could be ascertained to be harmful is to expose a person to it and observe the reaction (record p. 231); but that the risk of using the spray was no more of a hazard than anything else (record p. 28).

If by the use of the word *"wilfull"* plaintiff intends to imply that the spray was used with reckless indifference to safety, that inference is not supported by the record.

The answer to this question by the trial court and by the Supreme Court of Florida in the negative is correct. Before the plaintiff can recover under the Federal Employers' Liability Act he must allege and show negligence on the part of the employer, and that such negligence was the proximate cause of his injury.

There are many decisions from the Supreme Court of the United States that the Federal Employers' Liability Act does not make the employer the insurer of the safety of his employees while on duty, but the basis of his liability is negligence which must be in whole or in part the cause of the injury. One of the cases to reiterate the rule is *Ellis v. Union P.R. Co.*, 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572, wherein the Court stated:

> "The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in part' the cause of the injury. 45 U.S.C.A. 51, 10A F.C.A. Title 45 Sec. 51; Brady v. Southern R. Co., 320 U.S. 476, 484, 88 L ed. 239, 245 S.Ct. 232."

A previous case is that of *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29, 64 S.Ct. 409, 88 L.ed. 520, Mr. Justice Murphy, writing for this Court, said:

> "In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67, 87 L ed 610, 617, 63 S.Ct. 444, 143 A.L.R. 967."

See also *Brady v. Southern R. Co.*, 320 U.S. 476, 64 S.Ct. 232, 88 L.ed. 239, where this Court said:

> "Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury. *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67, 87 L. ed 610, 617, 63 S.Ct. 444, 143 A.L.R. 967."

See also the case of *Baltimore & O. R. Co. v. Berry*, 286 U.S. 458, 52 S.Ct. 229, 76 L.ed. 1098. Mr. Justice Stone, in delivering the opinion of this Court, stated:

> "Proof of negligence by the railroad was prerequisite to recovery under the Federal Employers' Liability Act."

The case of *Atchison, T. & S. F. R. Co. v. Saxon*, 284 U.S. 458, 52 S.Ct. 229, 76 L.ed. 397, is likewise in point. Mr. Justice McReynolds, in delivering the opinion of this Court, stated:

> "As often pointed out, one who claims under the Federal Act must in some adequate way establish negligence and causal connection between this and the injury. *New York C. R. Co. v. Ambrose*, 280 U.S. 486, 74 L. ed. 562, 50 S. Ct. 198, *Atchison T. & S. F. R. Co. v. Troops*, 281 U.S. 354, 74 L. ed. 899, 50 S.Ct. 281."

In the case of *Chesapeake & O. R. Co. v. Stapleton*, 279

U.S. 587, 49 S.Ct. 442, 73 L.ed. 861, Mr. Chief Justice Taft, in delivering the opinion of this Court, stated:

> "The language of the Federal Employers' Liability Act shows unmistakably that the basis of recovery is negligence and that without such negligence no right of action is given under this act * * *."

Petitioner contends that the doctrine of law laid down by these decisions are "swept into discard with the adoption of the 1939 amendment to the Federal Employers' Liability Act." Petitioner cites the case of *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 63 S.Ct. 444, 87 L.ed. 610, as authority. The 1939 amendment wiped out every vestige of the doctrine of assumption of risk. This Court said in that case:

> "It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, releasing the employee from the burden of assumption of risk by whatever name it was called. The result is an act which requires cases tried under the Federal Act to be handled as though no doctrine of assumption of risk had ever existed."

Negligence must still be proven in order for an employee to recover under the Federal Employers' Liability Act. The 1939 amendment did not change that rule. See *Ellis v. Union P.R. Co.*, supra, and *Brady v. Southern R. Co.*, supra.

Under the Federal Employers' Liability Act, employers' liability is to be determined under the general rule which defines "negligence" as lack of due care under the circumstances, or failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation, or doing what such reasonable and prudent man, under existing circumstances, would not have done. *Sheaf v. Minneapolis, St. Paul & S.S.M. R. Co.*, 162 F 2d 110.

To follow plaintiff's contention to its logical conclusion would dispense with the necessity of finding negligence and would require every case under the Federal Employers' Liability Act to be submitted to a jury. But negligence must still be proven in order for an employee to recover under the Federal Employers' Liability Act. The 1939 amendment did not change that rule. *Ellis v. Union P.R. Co.*, supra, *Brady v. Southern R. Co.*, 320 U.S. 476, 64 S.Ct. 232, 88 L ed 239.

In stating his second question, plaintiff again assumes the correctness of his position on the very point in controversy: First, that the spray was poisonous and toxic and willfully used, and secondly, that the plaintiff was compelled to work in contact with the spray after it was known by the defendant to be poisonous. These assumptions are unwarranted and not supported by the record. The plaintiff imputes negligence in that the defendant did not make tests of the mixture before it was used to assure that it would not be harmful, and further, that the defendant was negligent in continuing to use the mixture as a spray and to require the plaintiff to continue to work where it had been sprayed after he had complained about the use of it.

The record discloses that plaintiff made some general complaints (record p. 139), but it is not indicated when the complaints were made, or that the yardmaster knew the cause of plaintiff's skin eruption (record p. 141), or that plaintiff himself knew what caused his ailment until April or May of 1952 (record pp. 176,177, 189,190).

If the plaintiff didn't know the cause of his ailment until May of 1952, and if the yardmasters didn't know the cause of plaintiff's ailment, all of which is borne out by the record, then certainly the defendant had no knowledge of any harm to the plaintiff from use of the spray in the month of June 1951, the time complained of by the plaintiff.

But plaintiff says that defendant should have known that the spray was harmful, and if not harmful to others, the defendant should have known that it was harmful to plaintiff.

Plaintiff produced as a witness Jack H. Bowen, M.D., of whom plaintiff's counsel said, "This gentleman is in a highly specialized field; probably not only outstanding in his profession, but in this particular field, probably the most outstanding man in the southeastern part of the United States." (record p. 238). Dr. Bowen testified that the use of the creosote spray was no more than the ordinary hazards of life (record p. 28), and that probably the only way you could tell whether or not the use of it would be harmful to anyone was to put it out and use it (record p. 231).

If the hazard in the use of the spray is no more than the ordinary hazards of life, then the defendant was not negligent in using the spray without first making tests or experiments.

Of the plaintiff's ailment, Dr. Bowen said, "it is so unusual to see a photosensitized dermatitis, very unusual . . ." (record p. 231); also, the normal person would not react to the fumes from the spray of creosote and diesel fuel as used by the defendant as a weed killer. "No. The usual person does not react to this. Of course, if they did, they wouldn't use it down there." (record p. 230)

No reasonable physical examination of the plaintiff would have disclosed his peculiar reaction to the creosote spray:

> Mr. Murrell: Q "And there is no way to tell whether a person is or is not allergic, as I understand it, Doctor, until such time as the spray has been put out and they have been affected by it; is that correct?"

Dr. Bowen: A "That is actually the way it is done, usually done, because it is so unusual to see a photosensitized dermatitis, very unusual." (record p. 231)

Creamer v. Ogden Union Railway & D. Co., 242 P 2d 575, is similar to the instant case. Creamer was a coach cleaner for the railroad. He suffered heart injury from overexertion. The Court stated:

"In a very able brief counsel urge . . . that out of 100 or more coach cleaners defendant should have foreseen the probability that one of them might possess a latent, undetectable physical weakness like plaintiff's requiring defendant to furnish all coach cleaners with equipment capable of eliminating any manual labor possibly inimicable to one having such weakness. Such contention, we believe and hold, would strain accepted concepts personal to the mythical but nonetheless legally recognized ordinary prudent man, hitherto recognized by us (*Lasagna v. McCarthy,* 111 Utah 269, 177 P 2d 734), and, absent statutory requirement to the contrary, would cast a master in the role of insurer against undiscoverable physical eccentricity. The law does not accept such a view either generally (175 A.L.R. 985; *Owen v. Rochester-Penfield Bus Co.,* 278 App. Div. 5, 103 NYS 2d 137; *Louisville & N. R. Co. v. Willhite,* 300 Ky. 75, 187 SW 2d 1010; *Spencer v. Atchison, T&SF Ry. Co.,* 92 Cal. App. 2d 490, 207 P. 2d 126) or under the F.E.L.A. (*So. Ry. Co. v. Bell,* 4th Cir., 114 F 2d 341; *Lowden v. Bowen,* 199 *Okla.* 180, 183 P 2d 980)—but honors the common law principle of ordinary prudence even where there is a failure to supply the latest and safest equipment. (*Atlantic Coast Line R. Co. v. Craven,* 4th Cir., 185 F 2d 176; *Lowden v. Bowen,* supra).

"Under the Act (Federal Employers' Liability Act) the master's negligence must be shown before liability arises." (*Lasagna v. McCarthy,* supra)

* * *

Continuing, the Court further stated:

"Where a latent physical defect is not known either by the master or the servant . . . to hold the master liable regardless of such facts, . . . is to predicate negligence on some elusive quality of clairvoyance quite inconsistent with principles of reasonable foreseeability. 175 ALR 985. We have held that where products sold in channels of trade result in an injury to a person having an allergy that is not reasonably foreseeable, there can be no recovery, and we believe the reasoning there applicable here. (*Bennett v. Pilot Products Co.* (Utah) 235 P 2d 525, 26 ALR 2d 958)

"Our sympathy extends to plaintiff, but we must subordinate it, if in the honoring of it we uproot the principle that, absent statutory requirement, there can be no recovery if no legal duty has been violated.

"As to plaintiff's contention that denying recovery here denies him a constitutionally guaranteed jury trial, answer is found in the language of Mr. Justice Wolfe in a case decided by us (*Raymond v. U.P.R. Co.*, 113 Utah 26, 191 P 2d 137) and in decisions of the U. S. Supreme Court (*Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573, 71 S.Ct. 428, 95 L ed 574), to the effect that no such deprivation occurs where the facts indisputably establish no right to relief."

In the Bennett case mentioned above, the Court stated (26 ALR 2d, Text 961):

"Appellant appeared to be sensitive to the mixture much the same as some people respond to strawberries, —a commodity honored so frequently by the authorities in illustrating difference in liability to the allergic in contrast to the normal individual. We believe, that under the facts of this case, the trial judge strained neither common sense nor realism in concluding that appellant's ailment, being the result of an allergy, was not compensable as a matter of law. We are sympathetic with appellant and her misfortune, but cannot require the

merchant to assume the role of absolute insurer against physiological idiosyncracy. To do so also would invest the elusive ordinary prudent man with a quality of foreseeability that would take him out of character completely. Every substance, including food which is daily consumed by the public, occasionally becomes anathema to him peculiarly allergic to it. To require insurability against such an unforeseeable happenstance would weaken the structure of common sense, as well as present an unreasonable burden on the channels of trade."

In *Urie v. Thompson*, 69 S. Ct. 1018, 93 L ed. 1282, relied on by plaintiff, and in other cases involving silicosis, such as *James v. Pennsylvania*, 196 F 2d 1021, 101 Fed Supp 241, the employers' liability has been determined from the negligent and faulty maintenance of the locomotive sand box which permitted the sand dust to escape in unreasonably large quantities and thus injure the employee. Negligence is shown in the faulty maintenance, and the resulting ailment is one common to all people, and to which all people are susceptible, not an allergic reaction resulting from a physiological idiosyncracy.

V

CONCLUSION

Under the Federal Employers' Liability Act the railroad is not a guarantor nor an insurer of the safety of its employees. The basis of the railroad's liability is its negligence, not the fact that injuries occur.

In order for plaintiff to recover in this case, he must allege and prove, not that he was injured, but that the railroad negligently failed to use reasonable care to furnish him a reasonably safe place in which to perform his duties. This can only be done by showing affirmatively the negligent act or omission which rendered his place to work not reasonably safe to the plaintiff. Then, that negligence must be shown

to be the proximate cause, in whole or in part, of the injuries sustained by the plaintiff.

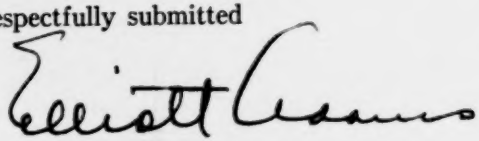
The theory of the complaint in this action is that the defendant carelessly and negligently failed to furnish the plaintiff a reasonably safe place to work. The place was the yards of the defendant at Jacksonville, Florida. Plaintiff contends that the diesel fuel-creosote spray rendered the yards unsafe. It may not have been safe for the plaintiff, but it was safe to the normal person, and there is no reasonable or foreseeable way in which the harmful effects to the plaintiff could have been anticipated.

Plaintiff further contends that defendant required him to continue work after notice of the unsafe condition to plaintiff. But the plaintiff himself did not know the cause of his injury; defendant's yardmasters did not know the cause of plaintiff's injury; and plaintiff's medical witness could not express an opinion that plaintiff's injury resulted from the cause alleged. In fact, the medical witness testified that in June of 1951, the date complained of, plaintiff's injury "could have been penicillin, it could have been creosote. He has had two or three reactions, and it could have been any number of things" (record pp. 242, 243). If the allegations and facts proven in this case are sufficient to state or prove a cause of action, then the resulting allergic reaction to any substance by any employee, no matter how rare or unforeseeable is sufficient upon which the jury may decide the question of negligence. Such a doctrine could so permeate the entire operation and maintenance of r lroads as to make the business a hodgepodge of the whims and caprices of various juries in all sections of our nation. Such a view would necessarily set up the juries' conception of what should be standard in place of the careful calculations and experience of engineers and other experts whose studied conclusions have been the standard heretofore prescribed and followed.

The plaintiff is entitled to no presumption of negligence nor can the Court assume, or allow the jury to assume, any negligence merely upon proof of existing conditions. The negligence must be affirmatively shown and that negligence must be proven to be the proximate cause.

It is respectfully submitted that, upon a careful consideration of the record, it will be found that there is no evidence, or any inference which reasonably may be drawn from the evidence, when viewed in a light most favorable to the plaintiff, which can sustain a recovery for the plaintiff. Defendant further respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted



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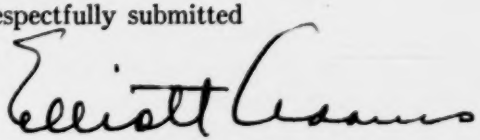

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